

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE CONCEPCION PENA, JR.,

Defendant

Case No. 1:02-CR-270-03

Hon. Richard Alan Enslen

**FINAL ORDER GRANTING
RELIEF PURSUANT TO 28
U.S.C. § 2255**

On December 13, 2006, this Court held an evidentiary hearing regarding Defendant Jose Concepcion Pena, Jr.'s Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. At such hearing, the Court summarized the existing record as supporting relief for Defendant Jose Concepcion Pena, Jr. under the United States Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220, 268 (2005); *Griffin v. Kentucky*, 479 U.S. 314, 328 (1987); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); and *Evitts v. Lucey*, 469 U.S. 386, 396 (1985). Furthermore, the testimony at such hearing showed without dispute that appellate counsel Robert Mirque, Sr.'s failure to raise a *Booker* issue on appeal was not due to any legitimate or defensible strategy, but was rather due to ignorance of the law and neglect. (See Hr'g Tr. at 11-24.) The evidence shows that this ineffective assistance on appeal prejudiced Defendant's clear entitlement under the Sixth Amendment to a sentencing utilizing an advisory federal guideline scheme. As such, the record warrants remedy under 28 U.S.C. § 2255.

At the conclusion of said hearing, the Court asked the parties to brief the issue of remedy on or before January 31, 2007. The Court only received one timely brief—that of defense counsel for

Jose Concepcion Pena, Jr. The briefing argues persuasively that an immediate re-sentencing is warranted under both the Supreme Court's case law cited above, and the Sixth Circuit's decisions cited in Defendant's Brief in Support of Re-Sentencing (especially including *United States v. Barnett*, 398 F.3d 516, 408 (6th Cir. 2005); *Franklin v. Anderson*, 434 F.3d 412, 429-30 (6th Cir. 2006); and, *Ballard v. United States*, 400 F.3d 404, 410-11 (6th Cir. 2005)). To effect this remedy, the Court will vacate the Judgment of Conviction and re-sentence Defendant under an advisory guideline scheme consistent with the rulings in *Booker*.

THEREFORE, IT IS HEREBY ORDERED that Defendant Jose Concepcion Pena, Jr.'s Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (Dkt. No. 101) is **GRANTED** to the extent that his Judgment of Sentence (Dkt. No. 71) be **SET ASIDE** and re-sentencing consistent with *United States v. Booker* shall commence as previously scheduled on February 23, 2007 at 2:30 p.m. All other section 2255 relief sought by Defendant is **DENIED** as either moot and/or unsupported by the record.

DATED in Kalamazoo, MI:
February 13, 2007

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE